Supreme Court, U.S.
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No. _____

In The
SUPREME COURT OF THE UNITED STATES

GLENDALE UNION HIGH SCHOOL DISTRICT,

Petitioner,

v.

CLAUDETTE LUTZ,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether a determination that an individual is substantially limited in a major life activity may be based solely on evidence of the degree of the impairment following the individual's termination from employment that was not available to the employer at the time the adverse employment action was taken.

Whether an individual attempting to establish that she was substantially limited in a major life activity must offer evidence that she was significantly restricted in the activity as compared to an average person in the general population.

PARTIES TO THE PROCEEDINGS BELOW

Claudette Lutz, Respondent herein, filed the underlying civil actions in this matter.

Petitioner is not a publicly held company. Petitioner does not have a parent corporation.

Petitioner Glendale Union High School District No. 205 (hereinafter referred to as "Petitioner" or "Glendale") respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit.

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CITATION OF THE UNOFFICIAL REPORTS OF OPINIONS AND ORDERS

Neither the judgment of the Ninth Circuit Court of Appeals nor the ruling by the limited States District Court for the District of Arizona are officially cited or published. Their citations are:

Court of Appeals No. 99-17410
District Court No. CV-98-01076-EHC

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported as Claudette Lutz v. Glendale Union High School District No. 205, et al., No. 99-17410 and is set forth in Appendix A.

The opinion of the United States District Court for the District of Arizona in Claudette Lutz v. Glendale Union High School District No. 205, et al., D.C. No. CV-98-01076, which was reviewed by the Court of Appeal is unpublished and set forth in Appendix B.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on April 20, 2001.

The jurisdiction of this Court is invoked under Title 28 of the United States Code, section 1254(1), and Rule 13 of the Supreme Court of the United States.

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Americans With Disabilities Act [42 U.S.C. § 12101 *et seq.*] (hereinafter "ADA") are set forth in Appendix C.

The relevant provisions of the Equal Employment Opportunity Commission (hereinafter "EEOC") interpretive guidelines for the ADA [29 C.F.R. pt. 1630 app., § 1630.2(j)] are set forth in Appendix C.

STATEMENT OF THE CASE
STATEMENT OF FACTS

Respondent Claudette Lutz (hereinafter "Respondent") is a former employee of Glendale, a public school system with nine high schools in the cities of Glendale and Phoenix, Arizona. Respondent was one of the assistant principals at Thunderbird High School (hereinafter "Thunderbird"). Respondent alleges that Glendale violated the Americans With Disabilities Act ("ADA") by terminating her employment.

Glendale had employed Respondent since 1972 and since 1983 she had been an Assistant Principal at different high schools. Her most recent assignment was the Assistant Principal of Student Services at Thunderbird. Her immediate supervisor was the school's Principal, Jennifer Johnson (hereinafter "Johnson"). Respondent disliked and did not get along with Johnson. She also did not get along with various counselors and administrators. There was rancor between Respondent and Johnson and had been for the last couple of years Respondent worked at Thunderbird. Because of her strained relationships with Johnson and other personnel, Respondent began to feel work-related stress.

The Superintendent, James Kieffer (hereinafter "Kieffer") and the Assistant Superintendents were aware of the rancor and rifts between Respondent and Johnson and between Respondent and certain personnel, which were negatively affecting her effectiveness. Respondent's problems with Johnson caused Kieffer to meet with Respondent in early May 1997. Prior thereto, in April 1997, Respondent submitted a written request to Superintendent Kieffer for a promotion to a principalship. Because of the situation at Thunderbird, and the conclusions that Respondent's relationship with Johnson was irreparable and she was no longer effective, Respondent was scheduled for reassignment. She was scheduled to transfer to Washington High School.

Respondent had been afflicted with diabetes for a number of years. Her diabetic condition was known to Johnson and District administrators. Her diabetic condition had not, however, affected her ability to perform the necessary duties, functions and responsibilities of the job. Respondent had never claimed that the diabetes kept her from doing her job nor asked to be given an accommodation to do her job. To the contrary, Respondent had not missed a day of work in over six months. In addition, Respondent had applied for a promotion to another position in another school, which proved to Kieffer that she was fully able to perform her job and her diabetic condition would not have any application.

In her June 4, 1997 meeting with Kieffer regarding her transfer, Respondent became angry and proceeded to argue with him. She stated that the reassignment could cause a worsening of her diabetes and asked that the reassignment be rescinded. After arguing and asking to stay at Thunderbird, she said she had only one year left before she was eligible for retirement. In response, Kieffer offered her

a teaching position for the time until her retirement, which she rejected. With regard to accommodation, it was pointed out that due to her dislike of and problems with her principal and other Thunderbird personnel, the transfer to Washington was for her betterment.

After accepting the fact that the transfer would go forward, Respondent was given a set of directives to follow. Respondent violated these instructions and directives. Shortly thereafter, at a meeting of all the faculty and administrators for Thunderbird, Respondent spoke before the assemblage and said, among other things, that the transfer to Washington was one of the worst things that had ever happened to her. She said:

> I had a friend who was killed in Vietnam; I was diagnosed with spina bifida so I could not have children; I saw my father in a body bag; and now this transfer to Washington. I wish instead of throwing a football [at the Superintendent], I wish I had thrown a hand grenade.[1]

The audience was shocked by her statement and it immediately received notoriety throughout the District, including Washington High School. Her conduct amounted to gross insubordination.

Kieffer asked Respondent to meet with him and explain her actions. She defended each of her actions (refusal to carry out the directives and the statement to the assemblage) as being reactions to a negative employment

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[1] The "football" statement was a reference to a "Faculty Farce" that took place in March 1997 in which Respondent, as part of a skit, threw a football at Kieffer who was seated in the audience.

transaction. She made no meaningful attempt to apologize for her actions or conduct. She again requested, however, to have the transfer rescinded until she could stabilize her diabetic condition. Kieffer again offered her the opportunity to teach or to be reassigned as an administrator at the North Annex, a very easy job, at the same salary and until she was eligible for retirement. Respondent rejected these offers. As a result, June 13, 1997 was her last day of work. On August 19-20, 1997, a termination hearing was held pursuant to the termination and hearing procedures set forth in the Arizona statutes, A.R.S. § 15-339, *et seq.* After hearing testimony and evidence, which included Respondent's presentation of testimony, evidence and medical documentation about her diabetic condition, the Glendale Board of Education voted unanimously to terminate her.

PROCEEDINGS BELOW

This case involves an action filed by Respondent, in Superior Court of Maricopa County on May 12, 1998. Glendale removed this action to the United States District Court for the District of Arizona on June 24, 1998, on the basis of federal question jurisdiction pursuant to Title 28, United States Code, section 1331.

On September 23, 1999, the District Court granted Glendale's motion for summary judgment. The District Court dismissed Respondent's state tort and contract claims, § 1983 claim and her ADA claim. With respect to her ADA claim, the District Court found that Respondent had failed to establish that she is a qualified individual with a disability within the meaning of the ADA. *See* Appendix C. Specifically, the District Court concluded that there was no evidence that Respondent had a substantially limiting impairment.

A timely Notice of Appeal from the Judgment of the District Court was filed by Respondent on or about October 22, 1999. However, Respondent did not challenge on appeal the District Court's decision insofar as it dismissed her state tort and contract claims and her § 1983 claim. The only ruling that Respondent appealed was the dismissal of her ADA claim.

On April 20, 2001, the Court of Appeals issued its Memorandum decision reversing the District Court. *See* Appendix A. The Court of Appeals concluded that the District Court erred in finding, as a matter of law, that Respondent is not a qualified individual with a disability within the meaning of the ADA. Specifically, the Court of Appeals found that there is a triable issue of fact as to whether Respondent is substantially limited in the major life activity of walking.

EXISTENCE OF JURISDICTION BELOW

The District Court had jurisdiction over the federal claims alleged by Respondent's Complaint hereinbelow under Title 28, United States Code, sections 1331, 1441(b) and 1446. The Court of Appeals had appellate jurisdiction under Title 28, United States Code, section 1291.

THE COURT OF APPEALS' DECISION CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS ON AN IMPORTANT QUESTION OF FEDERAL LAW.

This petition for a writ of certiorari should be granted because the Ninth Circuit Court of Appeals' Opinion conflicts with the decisions of other courts of appeals concerning the proper time frame for measuring whether an individual is substantially limited in a major life activity.

The Eleventh, Seventh, Sixth and Fifth Circuit Courts of Appeals, as well as many district courts, have held that when measuring an impairment to determine whether it is substantially limiting, courts must focus on evidence of the impairment prior to the date on which the employee requested an accommodation. The time-period is restricted so that only evidence that would have been available to the employer at the time it made the adverse employment action is considered. The Ninth Circuit Court of Appeals, on the other hand, based its decision that Respondent has a substantially limiting impairment on evidence regarding the degree to which Respondent was impaired over a year after she had been removed from working. By doing so, the Appellate Court has created a conflict with the Eleventh, Seventh, Sixth and Fifth Circuit Courts of Appeals as to whether such post-termination (or post-adverse action) evidence may serve as the basis for a court's ruling even though the employer itself would not have had the benefit of such evidence.

The following courts have held that in order to prevail on a claim of disability discrimination, a plaintiff must prove that she had a substantially limiting impairment at the time of the discriminatory act. *See Pritchard v. Southern Co. Serv.*, 92 F.3d 1130, 1133 (11th Cir.), *amended on other grounds on reh'g*, 102 F.3d 1118 (11th Cir. 1996), *cert. denied*, 520 U.S. 1274 (1997) (court focused its inquiry on whether there was sufficient evidence that employee had a substantially limiting impairment "at the time of her termination"); *EEOC v. Sears Roebuck & Co.*, 233 F.3d 432, 438, (7th Cir. 2000) (the progression of an impairment following an individual's termination from employment may be viewed as a factor but is not determinative); *Kocsis v. Multi-Care Management, Inc.*, 97 F.3d 876, 884 (6th Cir. 1996) (in order to recover on an ADA claim, the plaintiff must first establish as part of her *prima*

facie case that she had a disability *"at the time of the discriminatory act."* (emphasis in original)); *Burch v. Coca-Cola Co.*, 119 F.3d 305, 315 (5th Cir. 1997), *cert. denied* 522 U.S. 1084, 118 S.Ct. 871 (1998) (*citing Pritchard,* 92 F.3d at 1133) ("[A]n impairment must be substantially limiting *at the time of the requested accommodation.*") (emphasis in original); *Kalekiristos v. CTS Hotel Management Corp.*, 958 F. Supp. 641 (D.D.C. 1997), *aff'd* 132 F.3d 1481 (D.C. Cir. 1997); *Eber v. Harris County Hosp. Dist.*, 130 F. Supp. 2d 847, 858 (S.D. Tex. 2001); *Fagan v. United Int'l Ins.*, 128 F. Supp. 2d 182 (S.D.N.Y. 2001); *Leicht v. Hawaiian Airlines Inc.*, 77 F. Supp. 2d 1134 (D.C. Hawaii 1999); *Lance v. University of Tennessee*, 60 F. Supp. 2d 773, 776 (E.D. Tenn. 1999); *Meekison v. Voinovich*, 17 F. Supp. 2d 725, 730 (S.D. Ohio 1998*); Adams v. Rochester Gen. Hosp.*, 977 F. Supp. 226, 232 (W.D.N.Y. 1997); *Boren v. Wolverine Tube, Inc.*, 966 F. Supp. 457 (N.D. Miss. 1997); *Dikcis v. Nalco Chem. Co.*, 974 F. Supp. 669, 673-674 (N.D. Ill. 1997); *Parker v. Metropolitan Life Ins. Co.*, 875 F. Supp. 1321, 1326 (W.D. Tenn. 1995). To determine if there was a substantially limiting impairment at the time of the discriminatory act, courts necessarily focus on evidence submitted regarding the degree of the impairment in the period leading up to the discriminatory act.

In *Kocsis*, after summarizing a Plaintiff's burden to establish that a disability existed as of the date of the adverse employment action, the Sixth Circuit Court of Appeals reversed the district court's decision because it had relied on evidence of the plaintiff's condition following her termination:

> The district court found that [the plaintiff] could satisfy the "disability" requirement for purposes of establishing her *prima facie* case

> because she was "*presently* under a diagnosis of [multiple sclerosis]." That premise is erroneous, however, because [the plaintiff] must establish that her disability existed **at the time of the discriminatory act**.

97 F.3d at 884 n.13 (emphasis in original, citations omitted).

In *Kalekiristos*, (a case affirmed by the Court of Appeals for the District of Columbia) the court held as follows:

> reports about which the defendant had absolutely no knowledge nor access to prior to terminating the plaintiff can not serve as the sole evidentiary basis of establishing an element of a *prima facie* case of disability discrimination. A person alleging a disability protected by the ADA has a burden of establishing with medical evidence the existence of the alleged disability, and presenting documentation during the term of employment, not following termination.

958 F. Supp. at 657.

The district court in *Fagan* found that the plaintiff had "produced no evidence that he had anything more than a temporary ailment *at the time of his employment* and, consequently, had not met his burden of proving that his injury qualified as a disability under the ADA." 128 F. Supp. 2d at 185-186. In reaching its finding, the court

determined that post-termination medical reports "were irrelevant as to the issue of whether plaintiff suffered a disability at the time of his employment." *Id.* at 186 n.2. Likewise, the court determined that evidence of a handicapped parking permit that was issued seven months after plaintiff's termination "cannot serve as the basis of [the plaintiff's] claim to a disability." *Id.*

In the present case, on the other hand, the Ninth Circuit Court of Appeals relied exclusively on evidence of Respondent's impairment after her employment with Petitioner had ended. First, the Appellate Court relied on an affidavit of Respondent that she signed on July 31, 1998, over thirteen months after she was no longer working and almost one year after her termination and in which she testified to her condition on the date of signature. The affidavit states in pertinent part (i.e., the part quoted and relied on by the Ninth Circuit in its Memorandum decision):

> If I work in the yard for any length of time, I will have a low blood sugar reaction and my mother whom I live with has to continually check on me in the yard to make sure that I have not passed out. I do very little work around the house, as vacuuming and mopping of the home and other physical activities causes me to have low blood sugar and therefore I do not do these activities now more than one time every couple of months at most. I am very limited in my ability to do these things.

Based on this written statement, made in the present tense and signed almost a year after Respondent was terminated, the Ninth Circuit Court of Appeals found as follows:

> [Respondent's] own affidavit indicates that even light physical activity, including "walking for any distance [such as to] grocery shopping" and working around the house, such as vacuuming, mopping and yard work, "causes me to have low blood sugar and therefore I do not do these activities more than one time every couple of months at most."

See Appendix A, page 2. Furthermore, based on Respondent's affidavit, the Appellate Court concluded that "[t]he evidence in the record is sufficient to support a finding that [Respondent] cannot walk for even a minimal distance more than one time every couple of months." *See* Appendix A, pages 3-4.[2]

Additionally, the Ninth Circuit stated that the affidavit of Respondent's doctor confirms her reported difficulties with walking. Like Respondent's affidavit, however, her doctor's affidavit was signed nearly ten months after Respondent's termination from employment. Moreover, the affidavit does not even mention the word walking, let alone state that Respondent had difficulties walking during the period of her employment. Likewise, the doctor's letter used at her termination hearing made no mention of any difficulty whatsoever about walking.

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[2] This contradicts the 38 pages of medical evidence submitted by Respondent at her termination hearing. No record expresses her inability to walk; to the contrary, she underwent a 5-minute, 29-second exercise treadmill test without any problem in February 1997.

Nevertheless, based entirely on such after-the-fact evidence, the Ninth Circuit held: "This evidence is sufficient to support a finding that [Respondent] is substantially limited in the major life activity of walking."[3] *See* Appendix A, page 3. This finding is against the overwhelming weight of the evidence in the record for the period of time the Respondent was working.

By basing its decision on evidence of Respondent's condition over a year after she was through working, the Ninth Circuit Court of Appeals effectively rejected the decisions of the Eleventh, Seventh, Sixth and Fifth Circuits that requires a plaintiff to demonstrate the existence of a substantially limiting impairment at the time of his/her employment. If the Ninth Circuit had focused its inquiry to the pre-termination evidence of Respondent's impairment, it undoubtedly would have affirmed the district court's grant of summary judgment because there is no evidence that Respondent had a substantially limiting impairment during the period of her employment.

Now, Respondent calls upon this Court to resolve the question whether post-termination evidence about which an employer did not and could not have had knowledge of prior to terminating the plaintiff can serve as the sole evidentiary basis for establishing an element of a *prima facie* case of disability discrimination. This Court' decision in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), suggests that it cannot: "Because the phrase 'substantially limits' appears in the Act in the present indicative verb form, we think the language is properly read as requiring that a person be

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[3] The Court of Appeals also pointed to the fact that the District Court noted that Respondent's blood sugar levels "affected her . . . walking" and her medical records "confirm her reported difficulties with walking." *See* Appendix A, pages 2-3.

presently – not potentially or hypothetically – substantially limited in order to demonstrate a disability." *Id.* at 482. However, because the Court has not squarely addressed the issue, Respondent respectfully requests that the Court do so now.

THE COURT OF APPEALS' DECISION EFFECTIVELY DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW IN A MANNER IN CONFLICT WITH SEVERAL CIRCUIT COURTS

In order to be considered a qualified individual with a disability, a plaintiff must establish that she has a physical or mental impairment that substantially limits one or more major life activity. 42 U.S.C. § 12102(2)(A). Although the ADA does not define "substantially limits", the EEOC has issued interpretive guidelines (hereinafter "EEOC regulations") that explains the term. 29 C.F.R. pt. 1630 app., § 1630.2(j). The regulations provide that an individual is substantially limited in a major life activity if she is:

> (i) unable to perform a major life activity that the average person in the general population can perform; or (ii) significantly restricted as to the condition, manner or duration under which an individual can perform a major life activity as compared to the condition, manner or duration under which the average person in the general population can perform that same major life activity.

29 C.F.R. § 1630.2(j).[4]

[4] In addition, the regulations provide that the "nature and severity of the impairment," the "duration or expected duration of the impairment," or

This Court has pointed out that "[n]o agency...has been given authority to issue regulations implementing the general applicable provisions of the ADA." *Sutton*, 527 U.S. at 479. Nevertheless, several United States courts of appeals have sanctioned courts' reliance upon – and in some cases have compelled parties' compliance with – the EEOC regulations. *See, e.g., Gonzales v. National Bd. Of Med. Exam'rs*, 225 F.3d 620 (6th Cir. 2000) (comparing appellant's abilities with abilities of average person in general population); *Doyal v. Oklahoma Heart, Inc.*, 213 F.3d 492, 497 (10th Cir. 2000)("Because [appellant] introduced no evidence suggesting she experienced greater difficulty than anybody else learning the new computer system or any other new material, she has failed to demonstrate that she was significantly restricted in learning."); and *Soileau v. Guilford of Maine, Inc.*, 105 F.3d 12, 16 (1st Cir. 1997) ("Impairment is to be measured in relation to normalcy, or, in any event, to what the average person does.").

Furthermore, several United States courts of appeals have specifically upheld the requirements set forth in the EEOC regulations where the major life activity at issue is walking.[5] For example, in *Maynard v. Pneumatic Products Corp.*, 233 F.3d 1344 (11th Cir. 2000), the appellant argued that he was substantially limited in the major life activity of walking because his back injury restricted the duration, manner or condition under which he could perform the major life activity. *Id.* at 1347. The Eleventh Circuit Court of

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"the permanent or long term impact, or the expected permanent of long term impact of or resulting from the impairment" are to be considered. 29 C.F.R. § 1630.2(j). This Court has adopted this section of the regulations. *Albertsons, Inc. v. Kirkingburg*, 525 U.S. 555 (1999).

[5] The EEOC regulations include walking as a major life activity. 29 C.F.R. § 1630.2(i).

Appeals rejected the appellant's claim, holding: "[t]o sustain his burden of proof, [appellant] needed to prove that his ability to walk is significantly restricted *as compared to the average person in the general population*. This [appellant] did not do." *Id.* at 1347-1348. (emphasis in original). The appellate court defined the crucial role of the regulations as follows:

> [T]he claimant must present sufficient evidence of the significant restriction before the court may turn the issue over to the trier of fact. This evidence must include information regarding the abilities of the average person in the general population. [Appellant] proffered no evidence on this point, and thus failed to make out a *prima facie* case.

Id. at 1349.

Similarly, the EEOC regulations recently played a pivotal role in a Seventh Circuit decision. *Moore v. J.B. Hunt Transportation, Inc.*, 221 F.3d 944 (7th Cir. 2000). In rejecting the appellant's claim that his rheumatoid arthritis substantially limited his ability to walk because it affected the "rate and pace" of his activities (as opposed to his ability to perform them), Appellant admitted that he could walk distances of less than a mile consistently and could even walk a mile if he paid attention to what he was doing. The Seventh Circuit rejected his claim, holding: "We do not believe that these limitations constitute significant restrictions on [appellant's] ability to walk when compared with the ability of the average person . . . ." *Id.* at 951.

Moreover, in *Kelly v. Drexel University*, 94 F.3d 102, 105 (3rd Cir. 1996), the Third Circuit Court of Appeals quoted the regulations and then held that "the question presented is whether [the plaintiff] adduced sufficient evidence from which a factfinder reasonably could conclude that the nature and severity of his injury significantly restricted his ability to walk as compared with an average person in the general population." *See also Taylor v. Pathmark Stores, Inc.*, 177 F.3d 180, 186 (3d Cir. 1999) ("there was no testimony that [appellant] stands or walks, during the fifty minutes per hour that he can, with any less ability than the average person.").

Relying on the Third Circuit's decision in *Kelly*, the Sixth Circuit Court of Appeals held that the plaintiff failed to demonstrate that he is disabled within the meaning of the ADA and the regulations. *Penny v. United Parcel Serv.*, 128 F.3d 408, 415 (6th Cir. 1997) (*quoting Kelly*, 94 F.3d at 105). The appellate court found that "[a]lthough the record clearly indicates that [plaintiff] suffers an impairment that affects to some degree his ability to walk, he has not 'adduced sufficient evidence from which a factfinder reasonably could conclude that the nature and severity of his injury significantly restricted his ability to walk as compared with an average person in the general population.'" *Penny*, 128 F.3d at 415.

In *Talk v. Delta Air Lines Inc.*, 165 F.3d 1021, 1025 (5th Cir. 1999), the appellant asserted that she walked with a limp and moved at a significantly lower pace than the average person. Nevertheless, the Fifth Circuit Court of Appeals found that "although [appellant] experiences some impairment to her ability to walk, it does not rise to the level of a substantial impairment as required by the ADA." *Id.*

In *Colwell v. Suffolk County Police Dept.*, 158 F.3d 635, 644 (2d Cir. 1988), *cert. denied*, 526 U.S. 1018 (1999), the Second Circuit Court of Appeals quoted the regulations and held: "the evidence was insufficient to support the finding that any of the officers' impairments were substantial, particularly when evaluated in light of the first EEOC factor: 'the nature and severity of the impairment' as compared with the average person's ability to perform those activities."

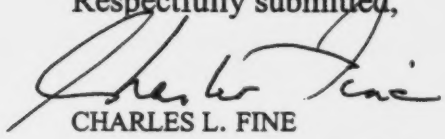
In the present case, on the other hand, Respondent offered no evidence whatsoever of her ability to walk as compared to the ability of an average person in the general population. Respondent's failure to offer such evidence did not present the Ninth Circuit Court of Appeals from overruling the district court's decision and finding in Respondent's favor. Although Petitioner quoted the EEOC regulations, which call for such comparative evidence, in the brief it filed with the Appellate Court, the court did not comment on Respondent's failure to provide any such evidence.

Respondent respectfully requests that the Court settle the question whether courts are bound by the EEOC regulations defining a substantial limitation in rendering decisions in ADA cases. Specifically, Respondent seeks this Court's guidance as to whether a plaintiff attempting to establish that he/she is substantially limited in a major life activity must offer evidence of his/her impairment as compared to an average person in the general population.

CONCLUSION

For the reasons expressed hereinabove, Petitioner Glendale Union High School District respectfully requests that its petition for a writ of certiorari be granted.

Respectfully submitted,



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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 99-17410

CLAUDETTE LUTZ, Plaintiff-Appellant,

v.

GLENDALE UNION HIGH SCHOOL DISTRICT NO. 205; GOVERNING BOARD OF GLENDALE UNION HIGH SCHOOL, DISTRICT NO. 205; JAMES KIEFFER, Superintendent, in his official capacity; JENNIFER JOHNSON, Principal, in her official capacity, Defendants-Appellees.

MEMORANDUM[1]

Appeal From The United States District Court
for the District of Arizona

Decided and Filed April 20, 2001

Before: REINHARDT, TASHIMA and BERZON, Circuit Judges

Claudette Lutz appeals the district court's entry of summary judgment in favor of defendant-appellee, Glendale Union High School District ("Glendale," or "the District"),

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[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by 9th Cir. R. 36-3

in her suit under the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 (ADA"). We reverse. The facts are familiar to the parties, so we do not recite them here except as necessary to explain our decision.

The district court granted summary judgment on the sole ground that Lutz had not demonstrated that she was substantially limited in any major life activity.

Lutz's diabetes is described as "uncontrolled," which signifies that, even with the mitigation measures she employs, Lutz still experiences frequent, extreme, and unpredictable blood sugar fluctuations. The physical symptoms of Lutz's brittle diabetes are largely undisputed. The district court noted that the "dramatic swings in her blood sugar levels. . .affected her thinking and walking, caused her lightheadness, made it difficult for her to concentrate, affected her moods, caused migraine headaches that affected her vision, and caused nausea and vomiting." In addition, Lutz's own affidavit indicates that even light physical activity, including "walking for any distance [such as to go] grocery shopping" and working around the house, such as vacuuming, mopping, and yard work, "causes me to have low blood sugar and therefore I do not do these activities now more than one time every couple of months at most." Lutz's medical records, and the affidavit of her doctor, Laurence Nilsen, confirm her reported difficulties with walking, among other things.

This evidence is sufficient to support a finding that Lutz is substantially limited in the major life activity of walking. The record shows that Lutz does not allow herself to walk for "any distance," which she defined as long enough to go grocery shopping, because to do so precipitates a low blood sugar reaction. Given the potentially life-threatening consequences of a low blood sugar reaction for Lutz, the

extreme limits she places on the manner and duration of her walking are an appropriate attempt to mitigate the symptoms of her diabetes. While we must consider mitigation measures in assessing the degree of an individual's limitation, Sutton v. United Airlines, Inc. 527 U.S. 471, 475 (1999), we must also consider the limitations imposed by the mitigation measures themselves. Id. at 482 ("if a person is taking measures to correct for, or mitigate, a physical or mental impairment, the effects of those – both positive and negative – must be taken into account when judging whether that person is 'substantially limited' in a major life activity and thus 'disabled' under the Act"); see also EEOC & Keane v. Sears, Roebuck & Co., 233 F.3d 432, 438-39 (7th Cir. 2000) (holding that factual issues existed with respect to whether an employee was substantially limited in the major life activity of walking where her diabetes-related neuropathy required her to limit her walking).

The evidence in the record is sufficient to support a finding that Lutz cannot walk for even a minimal distance more than one time every couple of months. There is, therefore, a triable issue as to whether she is "significantly restricted as to the condition, manner, or duration" with which she can walk. 29 C.F.R. §§ 1630.2(j)(1)(i)-(ii); see also Sutton, 527 U.S. at 480; 29 C.F.R. Pt. 1630, App. ("An impairment is substantially limiting if it significantly restricts the duration, manner or condition under which an individual can perform a particular major life activity as compared to the average person in the general population's ability to perform that same major life activity. Thus, for example, *an individual who, because of an impairment, can only walk for very brief periods of time would be substantially limited in the major life activity of walking.*") (emphasis added); Bragdon v. Abbott, 524 U.S. 624, 641 (1998) ("The Act addresses substantial limitations on major life activities, not

utter inabilities.")[2] The district court therefore erred in finding, as a matter of law, that Lutz is not a qualified individual with a disability within the meaning of the ADA.

We decline Glendale's invitation to affirm on two other grounds not relied on by the district court. On the present summary judgment record, the answers to the questions of whether there was a reasonable accommodation available and whether Lutz's disability caused the behavior that led to her termination, cf. Humphrey v. Memorial Hospitals Ass'n, 239 F.3d 1128, 1139-40 (9th Cir. 2001), are not straightforward. We therefore leave those questions for the district court to address in the first instance.

REVERSED AND REMANDED.

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[2] Lutz asserts that she is limited in her ability to perform a number of other major life activities. The evidence in the record, however, is inadequate to show that Lutz is *substantially* limited with respect to the other major life activities she identified, including thinking, seeing, sleeping, and interacting with others. Lutz has not provided evidence from which a jury could reasonably conclude that she is significantly restricted as to the condition, manner or duration of her ability to perform these major life activities.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
No. CIV 98-1076 PHX EHC

CLAUDETTE LUTZ, Plaintiff

v.

GLENDALE UNION HIGH SCHOOL DISTRICT No. 205;
GOVERNING BD. OF GLENDALE UNION HIGH
SCHOOL DISTRICT No. 205;
JAMES KIEFFER, Superintendent in his official capacity;
And JENNIFER JOHNSON, Principal in her official
capacity, Defendants.

Filed September 22, 1999

Before: Earl H. Carroll

Plaintiff Claudette Lutz filed this action in Maricopa County Superior Court against her former employer, Glendale Union High School District 205, the Governing Board of the District, Superintendent James Kieffer in his official capacity, and Thunderbird High School Principal Jennifer Johnson in her official capacity. Plaintiff alleges in part that she was terminated in violation of the Americans with Disabilities Act ("ADA") and in violation of her right to due process. Defendants removed to this Court based on those claims.

Defendants filed a motion for summary judgment on all of Plaintiff's claims, which Plaintiff opposes. Oral argument was held, but resolution of the motion was stayed pending settlement discussions and additional briefing.

The parties were unable to reach a settlement. Accordingly, the motions are addressed herein.

I. Background

Plaintiff was hired by the District in 1972. From that time on, Plaintiff worked for the District pursuant to year to year contracts and her employment was subject to the rules, regulations and policies of the District. During her employment, Plaintiff was transferred from one school to another seven or eight times.

In 1982, Plaintiff developed insulin dependent diabetes mellitus ('diabetes"). Plaintiff controls her diabetes by testing her blood sugar levels at regular intervals during the day and injecting insulin as needed. She also carefully manages her diet to control her diabetes because the failure to do so could render her comatose.

In 1983, Plaintiff was promoted to the position of administrator. Sometime thereafter, Plaintiff began applying annually for promotion to high school principal, but she was not promoted.

In 1990, Plaintiff became the Assistant Principal for Student Services at Thunderbird High School ("Thunderbird"). Thunderbird had two other assistant principals, who each had specific areas of responsibility, as did Plaintiff. All three were subject to the supervision of Principal Jennifer Johnson.

Rancor developed between Plaintiff and Johnson during the last couple of years that they worked together. Beginning in 1996, Plaintiff began to believe that Johnson was excluding her from meetings with other Thunderbird administrators. Plaintiff began to fear that Johnson would initiate disciplinary action against her because she had fallen out of favor with Johnson. Plaintiff began to experience increased work-related stress because of her relationship with Johnson.

Beginning in January 1997, Plaintiff began to experience dramatic swings in her blood sugar levels. Those swings in blood sugar levels affected her thinking and walking, caused her lightheadedness, made it difficult for her to concentrate, affected her moods, caused migraine headaches that affected her vision, and caused nausea and vomiting. On January 30, 1997, Plaintiff became light-headed and nauseous and thought she was going to pass out. Principal Johnson's secretary, Beverly Kucharek, drove Plaintiff home.

On February 5, 1997, Plaintiff consulted her doctor, Laurance Nilsen, regarding her symptoms. Dr. Nilsen referred her to other specialists for medical tests.

On March 6, 1997, Plaintiff participated in the "Faculty Farce." As a part of a skit, she tossed a football to Superintendent Kieffer, who was in the front row of the audience.

On April 15, 1997, Plaintiff again applied for a promotion to the position of principal as she had done for several years. She did not expect to be promoted based on repeated past denials.

In mid-to late May, 1997, Plaintiff was called into a meeting with Superintendent Kieffer regarding the relationship between she and Johnson.

On June 4, 1997, Plaintiff was again called into Kieffer's office for a meeting with him, Associate Superintendent Jan Rowe, and Johnson. Because Plaintiff had become concerned that she might be unfairly disciplined, she had begun secretly tape-recording some meetings and tape-recorded this meeting unbeknownst to the others present.[1]

Kieffer told Plaintiff that she was going to be transferred to Washington High School. Plaintiff was surprised and upset by the decision and immediately asked Kieffer to reconsider or allow her to try and improve the situation with Johnson in the coming year. She also asked to remain at Thunderbird for another year so that she could stabilize her medical situation because a transfer would exacerbate her already unstable symptoms. Kieffer refused, but he offered to allow Plaintiff to return to teaching at a teacher's salary if she felt that her health warranted it. Plaintiff refused to return to a position as a teacher because her pay would be substantially decreased. Plaintiff emphasized that she was able to continue as an administrator somewhere else, but that she did not want to transfer until her health had stabilized. Plaintiff also questioned the reasons for an immediate transfer. Kieffer told her that she had not been performing her job well enough.

Plaintiff was upset and expressed her disappointment about the decision. Kieffer told her he expected her to behave in a "loyal and professional" way about the change. Plaintiff again expressed her disappointment. At that point,

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[1] Both parties have submitted a transcription of that tape.

Johnson asked Plaintiff to tell them what she would say when asked about the transfer. Plaintiff asked Kieffer what the "company line" would be. Kieffer told her there was no company line, but he wanted to hear what she was going to say about the transfer. Plaintiff wanted time in which to consider the situation before doing so. Kieffer agreed.

Plaintiff then asked when the transfer would be announced and whether there was a gag order. Kieffer said, "Probably it might be best if you and Jennifer Johnson to meet with your administrative staff as soon as you can and then meet with your counselors and then I don't know what procedures you want to use on your own campus." He also told Plaintiff that the transfer would occur the following week, but that he did not "see a gag order." After learning how soon the transfer was to become effective, Plaintiff informed the group that she had a lot of tasks to complete before she left and her replacement came in, including packing up files in her office. Johnson asked Plaintiff to come by Johnson's office after they returned to campus. Plaintiff responded that she had to gather year-end math tests and probably would not be able to meet with Johnson until after lunch. Nevertheless, Johnson asked Plaintiff to stop by Johnson's office before gathering up the tests. Johnson then left the meeting. After meeting briefly with Washington High School Principal Sid Bailey, the meeting broke up. Plaintiff was upset and crying.

Plaintiff called her secretary from a cellular telephone after leaving the meeting and asked her to collect boxes and put them in her office without telling her why. Plaintiff then went home to compose herself and check her blood sugar level. Because she had not returned directly to the Thunderbird Campus, Plaintiff called Johnson's secretary, Beverly Kucharek, to notify her of her whereabouts and when she would return pursuant to district policy. Kucharek

detected that Plaintiff was upset and asked her why. Plaintiff told Kucharek that she was being transferred.

Johnson had anticipated that Plaintiff would be back on campus by 11:14; therefore, Johnson asked the other administrators to come to her office at 11:40, following the last class that day, in order to inform them of Plaintiff's transfer. Plaintiff returned to the Thunderbird campus at approximately 11:30. Johnson asked Plaintiff to come to her office. According to Johnson, she told Plaintiff that the other administrators were in her office and that it was time to tell them about the transfer. Plaintiff demurred until after she had collected the math tests from the faculty. Johnson informed the administrators of the transfer.

At 11:45, Johnson came to Plaintiff's office and asked her to come to her office at 12:00 (noon) to inform the five counselors of the transfer. According to Johnson, Plaintiff refused to attend the meeting and was upset with Johnson for setting the meeting. According to Johnson, Plaintiff also told Johnson that she never intended to speak to her again. Plaintiff denies saying that she would never speak to Johnson again and explains that she refused to attend the meeting because she was collecting the math tests, which required her attention.

After gathering the tests, Plaintiff went to Johnson's office and learned that Johnson had left for the day. Plaintiff then met with two of the five counselors to inform them of her transfer. She was unable to contact a third counselor and decided against informing the remaining two counselors, Larry Henderson and Manny Rivera, of her transfer herself because she had reprimanded those counselors in the past. Plaintiff did not meet with administrative staff to inform them of the transfer.

Plaintiff slept poorly the nights of June 4 and 5 because she was upset about the transfer. She also experienced migraines and blood sugar level swings.

On the morning of June 6, 1997, Plaintiff arrived a couple of minutes late for a faculty breakfast. At the breakfast, Plaintiff was commended for her service at Thunderbird and was asked to address the audience. Plaintiff recounted four difficult situations she had previously faced and said that the transfer was one more such occasion. She also told the audience that she should have thrown a hand-grenade instead of a football to Kieffer during the Faculty Follies. She told the audience that there were about one hundred people there and that she loved ninety-six of them. Finally, she said that there were some people there who might not appreciate her, but that they would all learn to do so in the near future. According to Plaintiff, she felt unwell that morning and blacked out during the course of her comments and does not remember making some of the comments.

Subsequent to the breakfast, Plaintiff met with Associate Superintendent Jan Rowe, Kieffer and Assistant Superintendent Vernon Jacobs. Kieffer asked Plaintiff about her comments and asked her to identify the four people she did not "love". According to Kieffer, he asked who the four people were because some of those present had felt threatened; however, he did not inform Plaintiff of his reasons for asking for their identities. Plaintiff admitted that she had made the comments at the breakfast, but she refused to identify the four people that she did not love. Kieffer then orally offered Plaintiff a one year contract at the Northern Annex followed by Plaintiff's retirement in lieu of bringing charges for insubordination. Plaintiff declined. On June 16, 1997, Kieffer put the offer in writing.

On June 25, 1997, Plaintiff sent a written apology to Kieffer for her remarks and agreed to accept a transfer to Washington High School.

Kieffer filed a Statement of Charges against Plaintiff with the Governing Board of the district ("Governing Board"). In the Statement of Charges, Kieffer recommended that Plaintiff be terminated for violating Governing Board Policies 3015 and 3026. Policy 3015 provided in relevant part that:

> The Governing Board may dismiss an administrator for cause during the term of his/her contract, subject to notice, hearing and appeal rights as provided in Title 15, Chapter 5, Article 3.

Policy 3026 provided in relevant part that:

> [T]he Governing Board reserves the right to initiate termination proceedings or to nonrenew a contract for serious or multiple violations of these rules or for any incident of insubordination, unprofessional conduct, or other reasons that it determines sufficient to constitute cause for severance of the employer-employee relationship.

Policy 3026 further provided that each administrator had the duty to carry out directives of supervisors and the board and that insubordination, disobedience, refusal to accept an assignment or to perform certain duties, or refusal to follow

written instructions established by the District constituted conduct that warranted discipline. Furthermore, appropriate discipline was left to the discretion of the supervisor and included:

> Termination. This remedy is reserved by law to the Governing Board, and procedures are described in applicable statutory provisions. The Governing Board may, if appropriate, determine that termination be imposed for serious or repeated violations of these rules.

Plaintiff was charged with insubordination and acting unprofessionally based on: (1) telling Kucharek (Johnson's secretary) about the transfer before other staff were notified; (2) instructing her secretary to collect boxes for her; (3) informing two of the five counselors of her transfer in the absence of Johnson and the other counselors; (4) refusing to meet with Johnson and the administrators upon her return to campus on June 4th; (5) refusing to meet with Johnson and the counselors on June 4th; (6) her remarks at the faculty breakfast; and (7) refusing to identify the four people at the faculty breakfast that she did not love.

A hearing was held on August 19-20, following notice and Plaintiff's demand for a hearing, which lasted until approximately 4:00 a.m., or approximately seven and half hours. Plaintiff was represented by counsel at the hearing. Both Plaintiff and the District offered testimony and exhibits. The Governing Board unanimously voted to terminate Plaintiff's employment for unprofessional and insubordinate conduct.

Plaintiff filed an appeal of her termination in Superior court. Plaintiff argued that the Board's decision was contrary to law and invalid because (2) the decision was founded on and contained errors of law including errors of construction, application of pertinent rules, and was not unanimous; (2) the decision was not supported by substantial evidence; (3) the decision was based upon a violation of Plaintiff's statutory rights under the ADA; and (4) the decision was arbitrary, capricious, and an abuse of discretion.[2] Plaintiff later withdrew her ADA claim. While her appeal from the Board's ruling was pending, Plaintiff filed this action.

On October 18, 1998, the Superior Court upheld Plaintiff's termination. (Ex. A to Defendants' Erratum). It found that the Governing Board had been properly constituted, that a quorum had been present, that Plaintiff had been afforded due process by the Board, and that evidence supported the Board's decision to adopt the Statement of Charges and to terminate Plaintiff's employment.[3] Plaintiff did not appeal from the Superior Court's decision.

Plaintiff alleges that she was denied due process at the administrative hearing because she was not given advance notice that her surreptitious tape recording would be discussed at the hearing. She alleges that Defendants

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[2] Appeals from the dismissal of school administrators by a school board are reviewed as provided in Ariz. Rev. St. § 41-785. Ariz. Rev. St. § 15-543(B). Section 41-785(D) provides that a decision may be reversed on the grounds that it was founded on or contained errors of law; was unsupported by evidence; materially affected by unlawful procedure; based on a violation of a constitutional right; or arbitrary and capricious.

[3] Given jurisdiction to review the Board's actions, this court would set aside the dismissal as arbitrary and capricious in light of Plaintiff's long service in the District and the de minimis nature of the alleged "insubordination."

breached her employment contract by terminating her rather than progressively disciplining her pursuant to the District's rules and policies. She alleges that Johnson and Kieffer breached the duty of good faith and fair dealing by using her medical condition as a pretext for terminating her, interfered with contractual relations, and intentionally inflicted emotional distress. She alleges that the District is liable under respondeat superior for the acts and/or omissions of Johnson and Kieffer. Finally, Plaintiff alleges that Defendants violated the ADA by failing to reasonably accommodate her disability.

Defendants seek dismissal or summary judgment as to all of these claims. Both parties have offered evidence in support of their positions. Accordingly, the motion will be treated as a motion for summary judgment.

Defendants subsequently filed a motion to supplement their motion for summary judgment to assert collateral estoppel and/or res judicata based on the denial of relief by the Maricopa County Superior court and the absence of an appeal from that decision. That motion will be granted.

II. Standard for Summary Judgment

Summary judgment is appropriate when the movant shows "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). "One of the principal purposes of the summary judgment rules is to isolate and dispose of factually unsupported claims." Celotex Corp. v. Catrett, 477 U.S. 317, 323-24 (1986). Substantive law determines which facts are material. "Only disputes over facts that might affect the outcome of the suit under the governing law will

properly preclude the entry of summary judgment." Anderson v. Liberty Lobby, 477 U.S. 242, 2149 (1986).

The dispute must also be genuine. A dispute about a material fact is genuine if "the evidence is such that a reasonable jury could return a verdict for the non-moving party." Id. at 249. There is no issue for trial unless there is sufficient evidence favoring the non-moving party. If the evidence is merely colorable or is not significantly probative, summary judgment may be granted. Id. at 249-50. In a civil case, the question is:

> Whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented. The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.

Id. at 252.

The moving party who has the burden of proof on the issue at trial must establish all of the essential elements of the claim or defense for the court to find that the moving party is entitled to judgment as a matter of law. Fontenot v. Upjohn, 780 F.2d 1190, 1194 (5th Cir. 1986); Calderone v. United States, 799 F.2d 254, 259 (6th Cir. 1986). However, the moving party need not disprove matters on which the opponent has the burden of proof at trial. Celotex, 477 U.S. at 322. Thus, summary judgment is proper if the non-moving party fails to make a showing sufficient to establish the existence of an essential element of their case on which they will bear the burden of proof at trial. Id. See also, High

Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563 (9th Cir. 1990).

III. Discussion

Plaintiff alleges that she was terminated in violation of her right to due process and the ADA. She also alleges state law claims for breaches of contract and the covenant of good faith and fair dealing, interference with contractual relationship, respondeat superior and intentional infliction of emotional distress. Defendants argue that Plaintiff's claims are barred by res judicata and/or collateral estoppel.

A. Res Judicata/Collateral Estoppel

"The doctrine of res judicata encompasses both claim preclusion and issue preclusion (or collateral estoppel) that bar, respectively, a subsequent action or the subsequent litigation of a particular issue because of the adjudication of a prior action." Greater Los Angeles Council on Deafness Inc. v. Baldridge, 827 F.2d 1353, 1359-60 (9th Cir. 1987). Federal courts must give the same "full faith and credit" to judicial proceedings of the states "as they have by law or usage in the courts of such State, Territory, or Possession from which they are taken." 28 U.S.C. § 1738 (1982). See Allen v. McCurry, 449 U.S. 90, 96 (1980). Thus, federal courts must give the same preclusive effect to state court judgments as would courts of the state in the jurisdiction in which the judgment was rendered. Gilbert v. Ben-Asher, 900 F.2d 1407, 1410 (9th Cir. 1990). "[R]es judicata and collateral estoppel not only reduce unnecessary litigation and foster reliance on adjudication, but also promote the comity between state and federal courts that has been recognized as a bulwark of the federal system." Allen, 449 U.S. at 95-96.

A claim will be precluded in a subsequent action if the prior adjudication (1) reached a final judgment on the merits; (2) involved the same claim, and (3) involved the same parties or their privies. Nordhorn v. Ladish Co., Inc., 9 F.3d 1402, 1404 (9th Cir. 1993). Under Arizona law a final judgment on the merits, rendered without fraud or collusion, bars a subsequent suit involving the same cause of action. Aldrich v. Martin, 837 P.2d 627, 629 (Ariz. App. 1982). Judgments subject to appeal are considered final under Arizona law for the purposes of res judicata. Casa Grande Trust Co. v. Superior Court, 444 P.2d 521, 523 (Ariz. 1968). See Misischia v. Pirie, 60 F.3d 626, 629 (9th Cir. 1994) (administrative decision becomes final judgment when a petitioner fails to appeal to state court within the period provided by law); Gilbert v. Bd. Of Med. Examiners, 745 P.2d 617, 622 (Ariz. App. 1987) (same).

Plaintiff alleges that she was denied due process in connection with her termination by the District. In the state court proceedings, Plaintiff also alleged that she was denied due process by the District. The Superior Court concluded that Plaintiff had not been deprived of due process in connection with her termination and that the District's actions in terminating her employment for cause were supported by evidence. Plaintiff did not appeal from the Superior Court's decision and that decision is final. Therefore, Plaintiff's due process and state law claims are barred by res judicata in this action. See Takahashi v. Bd. Of Trustees of Livingston Union Sch. Dist., 783 F.2d 848, 850 (9th Cir. 1986). Defendants will be granted summary judgment on these claims.

B. ADA Claim

Defendants argue they are entitled to summary judgment on Plaintiff's ADA claim because Plaintiff is not a

"qualified individual with a disability." Plaintiff contends that her diabetes constitutes a disability within the meaning of the ADA.

To prevail on an ADA claim, a plaintiff must establish that she is a "qualified individual with a disability." 42 U.S.C. § 12112(a). See Mustafa v. Clark County Sch. Dist., 157 F.3d 1169, 1174 (9th Cir. 1998). To do this, a plaintiff must demonstrate that: (1) she has a disability within the meaning of the ADA; (2) that she is qualified and able to perform the essential functions of the job with or without reasonable accommodation; and (3) that her employer terminated her because of her disability. Bradley v. Harcourt, Brace and Co., 104 F.3d 267, 271 (9th Cir. 1996).

A "disability" is defined as "a physical or mental impairment that substantially limits one or more major life activities" or being regarded as having such a disability.[4] 42 U.S.C. § 12102(2) (A); Holihan v. Lucky Stores, Inc., 87 F.3d 362, 364 (9th Cir. 1996). A "major life activity" is defined as "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. § 1630.2(i). An individual is substantially limited in a major life activity if she is significantly restricted in the condition, manner or duration of performing that activity as compared to what the average person in the general population can perform for the

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[4] A "physical impairment" includes:

> Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine[.]

29 C.F.R. § 1630.2(h) (1).

same activity. 29 C.F.R. § 1630.2(j) (ii). See Sutton v. United Airlines, Inc., 119 S.Ct. 2139, 2150-51 (1999).

The United States Supreme Court recently addressed when an employee or prospective employee may be found to be substantially limited in a major life activity.[5] See Sutton v. United Airlines, Inc., 119 S.Ct. 2139 (1999); Albertsons, Inc. v. Kirkingburg, 119 S.Ct. 2162 (1999); Murphy v. United Parcel Service, 119 S.Ct. 2133 (1999). In Sutton, the Supreme Court held that "the determination of whether an individual is disabled [under the ADA] should be made with reference to measures that mitigate the individual's impairment." Sutton, 119 S.Ct. at 2143. See Albertsons, Inc. v. Kirkingburg, 119 S.Ct. 2162 (1999); Murphy v. United Parcel Serv., Inc., 119 S.Ct. 2133 (1999). It noted that:

> Looking at the [ADA] as a whole, it is apparent that if a person is taking measures to correct for, or mitigate, a physical or mental impairment, the effects of those measures – both positive and negative – must be taken into account when judging whether that person is "substantially limited" in a major life activity and thus "disabled" under the Act . . . .

In Sutton, each of the two plaintiffs, who were twin sisters, had uncorrected vision of 20/200 or worse in the right eye and 20/400 or worse in the left eye. 119 S.Ct. at 2143. However, with the use of corrective lenses, each had vision of 20/20 or better and therefore could function identically to individuals without a vision impairment. Id. The plaintiffs

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[5] The parties were granted leave to supplement their briefs as to these decisions.

argued that their uncorrected vision substantially limited them in the major life activity of working and/or that they were regarded as substantially limited in the major life activity of working. Id. at 2150. They did not argue that they were substantially limited or regarded as substantially limited in the major life activity of seeing. Id. Taking into account the corrective lenses, the Supreme Court determined that the plaintiff's impairment did not substantially limit them in the major life activity of working nor were they regarded as being substantially limited in the major life activity of working.[6]

In her complaint, Plaintiff alleges that she is a qualified individual with a disability because her diabetes substantially limits her in major life activities without identifying those major life activities. In her response to Defendants' motion, Plaintiff argues that diabetes is per se a disability under EEOC guidelines and compliance manuals. The Supreme Court specifically held otherwise in Sutton. Plaintiff does aver that her medical condition limits her ability to walk for extended periods, to supervise the playground during hot weather, to perform household chores, and to perform other day to day tasks. However, those averments are not sufficient to create a jury question that Plaintiff is substantially limited in major life activities. Furthermore, Plaintiff was not substantially limited in her ability to work; she wished to continue working as an assistant principal, but resisted reassignment to another

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[6] The Court assumed without deciding that working was a major life activity and that the EEOC regulations interpreting the term "substantially limits" were reasonable, but found that the plaintiffs had "failed to allege adequately that their poor eyesight is regarded as an impairment that substantially limits them in the major life activity of working." Id. at 2151. As noted by the Court, "[w]hen the major life activity under consideration is that of working, the statutory phrase 'substantially limits' requires, at a minimum, that plaintiffs allege they are unable to work in a broad class of jobs." Id.

location because the stress of the reassignment would arguably damage her health. The evidence reflects that Plaintiff was experiencing stress at Thunderbird and that she would continue to experience stress if she remained at Thunderbird. Either way, there is no evidence that Plaintiff was substantially limited in a broad category of jobs. Accordingly, Defendants will be granted summary judgment as to this claim.

The Court being fully advised,

IT IS ORDERED granting Defendants' motion to supplement their motion for summary judgment. (Dkt. 21).

IT IS FURTHER ORDERED granting Defendants' motion for summary judgment and denying the motion to dismiss. (Dkt. 3-1 and 3-2).

IT IS FURTHER ORDERED entering judgment for Defendants and that Plaintiff take nothing by this action.

DATED this 22 day of September, 1999.

/s/ Earl H. Carroll
Earl H. Carroll
United States District Judge

APPENDIX C

RELEVANT STATUTORY PROVISIONS

United States Code, Title 29:

§ 1630.1 Purpose, applicability, and construction.

(a) Purpose. The purpose of this part is to implement title I of the Americans with Disabilities Act (42 U.S.C. 12101, et seq.) (ADA), requiring equal employment opportunities for qualified individuals with disabilities, and sections 3(2), 3(3), 501, 503, 506(e), 508, 510, and 511 of the ADA as those sections pertain to the employment of qualified individuals with disabilities.
(b) Applicability. This part applies to "covered entities" as defined at § 1630.2(b).
(c) Construction—

(1) In general. Except as otherwise provided in this part, this part does not apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 (29 U.S.C. 790-794a), or the regulations issued by Federal agencies pursuant to that title.
(2) Relationship to other laws. This part does not invalidate or limit the remedies, rights, and procedures of any Federal law or law of any State or political subdivision of any State or jurisdiction that provides greater or equal protection for the rights of individuals with disabilities than are afforded by this part.

§ 1630.2 Definitions.

(a) Commission means the Equal Employment Opportunity Commission established by section 705 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-4).

(b) Covered Entity means an employer, employment agency, labor organization, or joint labor management committee.
(c) Person, labor organization, employment agency, commerce and industry affecting commerce shall have the same meaning given those terms in section 701 of the Civil Rights Act of 1964 (42 U.S.C. 2000e).
(d) State means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Trust Territory of the Pacific Islands, and the Commonwealth of the Northern Mariana Islands.
(e) Employer—

(1) In general. The term employer means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person, except that, from July 26, 1992 through July 25, 1994, an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year and any agent of such person.
(2) Exceptions. The term employer does not include—

(i) The United States, a corporation wholly owned by the government of the United States, or an Indian tribe; or
(ii) A bona fide private membership club (other than a labor organization) that is exempt from taxation under section 501(c) of the Internal Revenue Code of 1986.

(f) Employee means an individual employed by an employer.
(g) Disability means, with respect to an individual—

(1) A physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(2) A record of such an impairment; or
(3) being regarded as having such an impairment.

(See § 1630.3 for exceptions to this definition).

(h) Physical or mental impairment means:

(1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or
(2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(i) Major Life Activities means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.
(j) Substantially limits—

(1) The term substantially limits means:

(i) Unable to perform a major life activity that the average person in the general population can perform; or
(ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

(2) The following factors should be considered in determining whether an individual is substantially limited in a major life activity:

(i) The nature and severity of the impairment;
(ii) The duration or expected duration of the impairment; and
(iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.

(3) With respect to the major life activity of working—

(i) The term substantially limits means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.
(ii) In addition to the factors listed in paragraph (j)(2) of this section, the following factors may be considered in determining whether an individual is substantially limited in the major life activity of "working":

(A) The geographical area to which the individual has reasonable access;
(B) The job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or
(C) The job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes).

(k) Has a record of such impairment means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.
(l) Is regarded as having such an impairment means:

(1) Has a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation;
(2) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or
(3) Has none of the impairments defined in paragraphs (h) (1) or (2) of this section but is treated by a covered entity as having a substantially limiting impairment.

(m) Qualified individual with a disability means an individual with a disability who satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position. (See § 1630.3 for exceptions to this definition).

42 U.S.C. § 12101

(a) Findings

The Congress finds that—

(1) some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older;
(2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against

individuals with disabilities continue to be a serious and pervasive social problem;

(3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;

(4) unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination;

(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;

(6) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally;

(7) individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society;

(8) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and
(9) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.

(b) Purpose

It is the purpose of this chapter—

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;
(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;
3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and
(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

§ 12102. Definitions

As used in this chapter:

(1) Auxiliary aids and services

The term "auxiliary aids and services" includes—

(A) qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments;
(B) qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments;
(C) acquisition or modification of equipment or devices; and
(D) other similar services and actions.

(2) Disability

The term "disability" means, with respect to an individual—

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
(B) a record of such an impairment; or
(C) being regarded as having such an impairment.